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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/584,298	06/23/2006	Hiroyuki Ichiyama	2006_0997A	9025
513 7590 04/08/2011 WENDEROTH, LIND & PONACK, L.L.P. 1030 15th Street, N.W., Suite 400 East Washington, DC 20005-1503				
EXAMINER				
PADEN, CAROLYN A				
ART UNIT		PAPER NUMBER		
1781				
NOTIFICATION DATE		DELIVERY MODE		
04/08/2011		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ddalecki@wenderoth.com
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Office Action Summary

Application No.

10/584,298

Applicant(s)

ICHIYAMA ET AL.

Examiner

Carolyn A. Paden

Art Unit

1781

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 December 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-5,7,9 and 10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3-5,7,9 and 10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-942)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 2, 2010 has been entered.

Claims 1, 3-5, 7, 9 and 10 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. It is not seen that the specification contemplates any and all amounts of tocopherol and rutin. Rather it is seen that the specification describes a process using 0.04-0.5% by weight tocopherol, as disclosed in the specification at page 13, lines 18-20. At the bottom of page 13, applicant describes the limitations in the results when tocopherol is used in higher and lower amounts. The rutin is limited at page 14, lines 9-11 to between 0.003-0.2% by weight. At page 14, lines

13-16, applicant describes the limitations in the results when rutin is used in higher and lower amounts. An amendment to the claim including the amounts of tocopherol and rutin would overcome the rejection.

Claims 1, 3-5, 7, 9 and 10 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for 0.04-0.5% tocopherol and 0.004 to 0.15% rutin, as shown in pages 13-14 of the specification, does not reasonably provide enablement for any and all amounts of tocopherol and rutin. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to practice the invention commensurate in scope with these claims.

It is not seen that the specification contemplates any and all amounts of tocopherol and rutin. Rather it is seen that the specification describes a process using 0.04-0.5% by weight tocopherol, as disclosed in the specification at page 13, lines 18-20. At the bottom of page 13, applicant describes the limitations in the results when tocopherol is used in higher and lower amounts. The rutin is limited at page 14, lines 9-11 to between 0.003-0.2% by weight. At page 14, lines 13-16, applicant describes the limitations in the results when rutin is used in higher and lower amounts.

An amendment to the claim including the amounts of tocopherol and rutin would overcome the rejection.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3-5, 7 and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bundus (3,488,198) as further evidenced by Potter (page 347) and Swern for reasons of record and further in view of Hasler-Nguyen (7,452,549).

Bundus discloses filled milk. In example 1 the filled milk is made from skim milk, coconut oil and emulsifier. In this case the nonfat milk solids come from skim milk and Potter is relied upon to show the nonfat milk solids from milk. First a mixture is made of the ingredients. Then the product is pasteurized by heating the mixture to 150F for 30 minutes. Finally the pasteurized mixture is homogenized (column 2, example 1). The emulsifier used in Myverol 18-07, which is described in column 1, lines 58-60 to include glycerol monostearate and glyceryl distearate and be free from unsaturated fatty acids. The mixing of the ingredients in example 1 is

seen to be the pre-emulsifying step. One of ordinary skill in the art would be able to calculate the extent of nonfat milk solids from the information provided by Potter and Bundus. The ratio of nonfat milk solids to fat would be expected to fall within the range of the claims because the fat content of the milk is so low. The non-milk fat in this case is coconut oil. Swern (page 315) is relied upon to show the fat composition of coconut oil as having the fatty acid composition required in the claims. The claims appear to differ from Bundus as further evidenced by Potter and Swern in the recitation that the emulsion is oil in water emulsion. One of ordinary skill in the art would expect the emulsion of Bundus to be oil in water emulsion because the fat content of the emulsion is so low. It is appreciated that the use of the product for blending or into a pudding is not mentioned but milk products are known in the art to be used in cooking for the preparation of other foods like pudding. The preparation of these foods would be expected to involve blending. It would have been obvious to one of ordinary skill in the art to expect the emulsion of Bundus to be oil in water emulsion that could be used for blending into other ingredients for pudding preparation or to make bavarois or jelly.

The claims also appear to differ from Bundus in the recitation of the inclusion of tocopherol and rutin. Tocopherol is well known in the art as a vitamin and as an antioxidant. Further Hasler teaches the tocopherol acts synergistically with polyphenols, like rutin to suppress oxidation (column 5, lines 11-22 and abstract). The concept of adding this synergistic mixture to beverages and foods, like milk is disclosed at column 10, lines 1-6. It would have been obvious to one of ordinary skill in the art to add the synergistic composition of Hasler-Nguyen to the filled milk of Bundus to suppress oxidation of the milk and to improve the free radical health of the consumer. It is appreciated that the time of adding the tocopherol and rutin is not mentioned but one of ordinary skill in the art would expect to add tocopherol and rutin during process in order to assure uniform fortification of the ingredients. It is also appreciated that photo degradation is not mentioned in the references. But applicant refers to photo degradation in the specification at page 2 as "irradiation". One of ordinary skill in the art would expect the tocopherol and rutin in Hasler-Nguyen to also prevent photo degradation because it slows oxidation by suppressing free radical production (column 1, lines 7-14). Further preamble limitations alone do not carry any patentable weight in process claims.

The rejection of the claims under 35 USC 102/103 has been withdrawn.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, D. Lawrence Tarazano can be reached by dialing 571-272-1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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/Carolyn Paden/

Primary Examiner 1781